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Who Are You Gonna Call? (Part 1)

California Joan Returns to Provide Advice on the Conflicts that Arise When a Corporation is the Opposing Party

By Ellen R. Peck

California Joan's partner Organization "Oggie" Mann limited his practice to defending corporate employers in employment discrimination and harassment matters. Cali's other partner, Meryl Terpitude, on the other hand, was a general civil litigation and trial attorney, who often represented both individuals and organizations against big corporations. Because of their practice perspectives, Oggie and Meryl had different philosophical points of view, frequently resulting in heated discussions on the law. As Cali dodged the quarreling pair, diving for her first cup of java for the day, she was astounded to hear them arguing about the application of rule 2-100, Rules of Professional Conduct, which contains prohibitions on communications with represented parties.

Rule 2-100 provides in part:

"(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

"(B) For purposes of this rule, a 'party' includes:

1. "An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

2. "An association member or an employee of an association, corporation or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

"When corporations are litigants, rule 2-100 throws up roadblocks to litigants' discovery of the truth. It allows corporate lawyers to block important informal discovery with corporate managers, supervisors and employees. These roadblocks also make it difficult to conduct sufficient pre-litigation discovery to decide whether I have probable cause to file a lawsuit," Meryl complained.

"Nonsense!" thundered Oggie indignantly. "At law, a corporation may be a 'person,' but in litigation, corporations can only gather information, speak and act through their human being constituents. Therefore, proscription of contact with represented parties is necessary to preserve the corporation's attorney-client relationship and privileged information from an opposing attorney's intrusion and interference. (*Jackson v. Ingersoll-Rand Co.* (1996) 42 Cal.App.4th 1163, 1167)

"In my experience, too many corporate lawyers have used the ambiguity of the application of the rule to block access to otherwise discoverable information and to charge opposing counsel with ethical improprieties. A bright line test is essential to the application of the rule.

"A lawyer seeking to interview corporate constituents must be able to determine beforehand whether particular conduct is permissible in order to prevent disqualification, discipline and to prevent the risk of chilling an advocate's legitimate zealous representation of a client. (*Nalian Truck Lines Inc. v. Nakano Warehouse & Transportation Corp.* (1992) 6 Cal.App.4th 1256, 1264) For these same reasons, the rule should be interpreted narrowly." (*Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 119)

In exasperation, Oggie exclaimed, "In the past few years, I think that the appellate courts have narrowed the scope of the rule well beyond my comfort level.

They have created bright line tests as clear as the Las Vegas strip!"

"Well, rule 2-100 still prohibits me from communicating with corporate officers or directors, the people who usually know the most about the corporate matters at issue in a dispute or who have the power to settle a matter," grumbled Meryl.

"Wouldn't you just like to get outside corporate counsel's presence with the corporate control group, since they also possess all of the corporate confidential information? Thank heavens there is still an absolute prohibition against talking to current officers, directors and managing agents," retorted Oggie.

"Yes, and you can get me and my entire firm disqualified for ex parte contact with a party-corporation's director even though the director was not within the control group," added Meryl. (*Mills Land and Water Co. v. Golden West Refining Co*. (1986) 230 Cal.Rptr. 461, 186 Cal.App. 3d 116)

Unmollified, Oggie complained, "My representation of a corporation is made increasingly difficult since opposing counsel can talk to a number of corporate constituents without my knowledge or permission. For example, the following ex parte contacts are permitted:

- "Former members of the corporate adversary's control group as long as there is no communication of privileged information. (*Nalian*, supra)
- "Unrepresented former corporate employees in most cases. (*Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 37 Cal.Rptr.2d 843)
- "Unrepresented present employees who are not corporate officers, directors or managing agents so long as the communication does not involve an employee's act or failure to act in connection with the matter which may bind corporation, be imputed to it, or constitute admission of corporation for purposes of establishing liability. (*Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 261 Cal.Rptr. 493)

"To add insult to injury, opposing counsel could have a dating relationship with my secretary and, unless I could prove that confidential information was being sought or disclosed, that lawyer would not be disqualified," Oggie complained. (*Gregori v. Bank of America* (1989) 207 Cal.App. 3d 291, 254 Cal.Rptr. 853, 207 Cal. App.3d 291, mod; rev. den)

"But, Oggie, it is too dangerous to have a social relationship with opposing counsel's support staff, since there would at least be an inquiry into whether confidential information had been disclosed, sidetracking from the issues in the litigation and costing the lawyer and the client additional money.

"Moreover, there is always the danger that opposing counsel's support personnel may 'blurt' out confidential information which could result in disqualification. So even though the law does not penalize a litigation lawyer having a social relationship with opposing counsel's support staff in the absence of disclosure of confidential information, it is illusory because there is a risk of hurting the your own client's case," Meryl argued.

"Well, the cases have gone even further. Rule 2-100 is not violated if a lawyer accepts representation of a corporate counsel's secretary to sue the corporation for unlawful discharge, where the secretary has obtained confidential information about another employment discrimination case against that corporation being handled by that same lawyer," Oggie added. (*Neal v. Health Net, Inc.* (2002) 100 Cal.App.4th 831, 123 Cal.Rptr.2d 202, reh. den., rev. den.)

Meryl then protested, "Those are rare cases. The chief difficulty for litigation counsel is determining which corporate employees are 'managing agents.' The task has been nearly impossible because you cannot ascertain whether that includes lower level supervisory employees or only top management or non-supervisory employees."

"Not anymore!" interjected Cali for the first time. "A new case has narrowed the definition of 'managing agent' within the meaning of rule 2-100(B)(1). (*Snider v. Superior Ct*. (Quantum Productions, Inc.) (Cal. App.4th 12/03/03)) The Court of Appeal for the Fourth Appellate District adopted a narrow definition of 'managing agent' as meaning 'an employee that exercises substantial discretionary authority that determines organizational policy.' This would therefore eliminate any mid-and low-level employees from the definition of 'managing agent' making them fair game for ex parte contact."

"Another tricky aspect is rule 2-100(B)(2)'s provision that corporate employees whose statements 'may constitute an admission on the part of the organization' are also 'represented parties' when the corporation is a party. Did the Snider case cut through that Gordian knot?" asked Meryl hopefully.

"Snider also narrowed the scope of (B)(2)'s application to (1) 'high-ranking executives and spokespersons with the authority to speak on behalf of the organization' or (2) to 'persons outside the "control group" if in fact the management-level employee was given actual authority to speak on behalf of the organization or could bind it with regard to the subject matter of the litigation,'" answered Cali. "It seems to me that the court would make non-party, non-management and unrepresented employees fair game for ex parte contact."

"But . . . there are frequently non-control group or management employees who receive or impart corporate attorney-client privileged information. How can I

protect the corporation's attorney-client information from ex parte contacts of opposing counsel if these employees are no longer within the scope of the rule?" sputtered Oggie, aghast.

"The Snider court pointed out that there is another remedy. Regardless of whether an employee comes within the terms of rule 2-100, an opposing counsel that violates the attorney-client privilege by acquiring confidential information from the opposing party's employees may be disqualified from further participation in the case.

"Moreover, under certain circumstances, the party-corporation may exclude improperly obtained evidence or obtain other appropriate relief measures to achieve justice and ameliorate the effect of improper conduct," Cali added. (*Triple A*, supra, 213 Cal.App.3d at p. 144)

"What if the corporate employee cannot remember all of the questions that an opposing counsel asked and the corporate litigant suspects that the opposing counsel asked questions eliciting privileged information?" asked Oggie.

"I'm afraid that the corporation-party has no remedy. The *Snider* court observed that that would be 'mere speculation' which cannot support a finding of a violation of rule 2-100 or disqualification of counsel," Cali answered.

"Snider sounds like an interesting case, tell me more about it," said Meryl.

Cali summarized the case: "David Snider was employed by an event design and construction company, Quantum, as a sales manager. In 2002, Snider left Quantum and formed Gardenia Design Group. Later in 2002, Quantum sued Snider and Gardenia for misappropriation of trade secrets, breach of contract, intentional interference with contractual relations and prospective economic advantage, and unfair competition, alleging that Gardenia was directly competing with Quantum and that Snider had stolen confidential and secret business information used to compete with Quantum. Snider denied these allegations.

"In a re-trial joint trial readiness report, Quantum listed Lewis, Quantum's director of productions who supervised 19 of its 40 employees, and Laura Janikas, Quantum's sales manager, as percipient witnesses, among others.

"Janikas' duties included selling Quantum's goods and services and supervising two employees; she had the authority to direct all Quantum's employees relating to goods and services in Quantum's contracts; and Quantum executives relied on her recommendations in making policies and procedures.

"After the joint trial readiness conference and before trial, Snider's lawyer, Larabee, contacted Lewis and Janikas to talk with them about the pending case. No substantive conversation with Lewis ever took place and Janikas talked with Larabee for about 10 minutes on the telephone.

"In response to Larabee's questions, Janikas told Larabee (1) her understanding of why Snider had been sued; (2) that she had not seen Snider's contract with Quantum; (3) that she and all other employees had a contract with Quantum; (4) her understanding of what the contract meant; and (5) that Quantum had sold wedding services before Snider quit.

Larabee also asked her about a meeting with key employees in October 2001, whether she took a pay cut after Sept. 11, 2001, the effect of the pay cut on her desire to continue with Quantum and many more questions that she could not remember.

At the end of the conversation, she told Larabee, in response to his question, that she had never talked to Quantum's litigation counsel about any of these matters.

"The trial court granted Quantum's motion to disqualify Larabee on the grounds that he violated rule 2-100. Snider petitioned for a writ of mandate, which was granted, and the Court of Appeal ordered vacation of the disqualification order.

"In addition to the finding that Lewis and Janikas were not within rule 2-100 for the reasons stated above, the court concluded that even if they were, the court erred because there was no evidence showing that Larabee had actual knowledge that the employees were represented parties.

"I have got to meet with a client; but I'll discuss the 'knowledge' component and how courts suggest that lawyers manage the risk of a prohibited rule 2-100 contact the next time we meet," Cali said as she dashed to her office.

■ *Ellen R. Peck, a former Judge of the State Bar Court hearing department in Los Angeles, is a sole practitioner in Escondido, a co-author of 'The Rutter Group's California Practice Guide — Professional Responsibility' and teaches Professional Responsibility at Concord University School of Law.*

Test — Legal Ethics
1 Hour MCLE Credit

1. There is no ethical prohibition regarding a lawyer informally contacting a represented opposing party outside of the presence of opposing counsel to determine whether it is necessary to take the opposing party's declaration

2. For the purposes of rule 2-100, when a corporation is the party, 'party' includes some constituents of the corporation.

3. Rule 2-100 prohibits contacts with corporate employees if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability.

4. Rule 2-100 prohibits contacts with corporate employees whose statements may constitute an admission on the part of the corporation.

5. Rule 2-100's proscription of contacts with represented parties is unnecessary to preserve the attorney-client relationship and privileged information from an opposing attorney's intrusion and interference and just hinder the search for the truth.

6. A bright line test is essential to the application of rule 2-100 because a lawyer seeking to interview corporate constituents must be able to determine beforehand whether particular conduct is permissible in order to prevent the risk of chilling an advocate's legitimate zealous representation of a client.

7. Violation of rule 2-100 may result not only in discipline but also in disqualification of the lawyer who made the improper contact.

8. An over-broad application of rule 2-100 does not risk chilling an advocate's legitimate zealous representation of a client.

9. A narrow construction of rule 2-100 is not necessary to educate lawyers about whether particular conduct is permissible in order to prevent disqualification, discipline and the risk of chilling an advocate's legitimate zealous representation of a client.

10. There is no absolute prohibition against talking to current corporate officers, directors and managing agents if the corporation is an opposing party.

11. An opposing lawyer who makes an ex parte contact with a party-corporation's director may be disqualified but the law firm of which he or she is a member will not be disqualified.

12. A lawyer will not be disqualified for contacting ex parte a former director of an opposing party corporation.

13. A lawyer will be disqualified for ex parte contacts with an unrepresented former employee of the opposing party corporation.

14. A lawyer may have ex parte contacts with unrepresented present employees of an opposing party corporation who are not corporate officers, directors or managing agents so long as the communication does not involve an employee's act or failure to act in connection with matter which may bind corporation, be imputed to it, or constitute admission of corporation for purposes of establishing liability.

15. A lawyer will not be disqualified for dating opposing counsel's secretary even if confidential information was being sought or disclosed.

16. Lawyer represents *Former Employee of Corporation vs. Corporation* in an employment discrimination case. Corporation's Legal Secretary, with confidential information about the *Former Employee vs. Corporation* case also hires Lawyer to represent her against Corporation in a separate unlawful discharge case (because she took the confidential information about the *Former Employee* case). Lawyer will be disqualified from *Former Employee vs. Corporation* because he violated rule 2-100 in talking with legal secretary.

17. For the purposes of applying rule 2-100(B)(1), 'managing agent' means 'an employee that exercises substantial discretionary authority that determines organizational policy.'

18. Low-level employees who serve as corporate media spokespersons are corporate "managing agents" for the purposes of rule 2-100.

19. Corporate employees whose statements "may constitute an admission on the part of the organization" mean either (1) "high-ranking executives and spokespersons with the authority to speak on behalf of the organization" or (2) to "persons outside the 'control group' if in fact the management-level employee was given actual authority to speak on behalf of the organization or could bind it with regard to the subject matter of the litigation."

20. Even if a corporate employee does not come within the terms of rule 2-100, an opposing counsel that violates the attorney-client privilege by acquiring confidential information from the opposing party's employees may be disqualified from further participation in the case

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LEGAL ETHICS

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Name

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Address

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1.	True____	False____	11.	True____	False____
2.	True____	False____	12.	True____	False____
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